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Panasonic Appliances Air-Conditioning (M) Sdn Bhd v Top Square Sdn Bhd & Ors (Shanmugam a/l Ramasamy & Ors, third parties)

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HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCV-161–03 OF 2016
SM KOMATHY J
21 DECEMBER 2020

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Companies and Corporations — Lifting of corporate veil — Piercing of corporate veil — First defendant issued invoice to plaintiff despite knowing no services rendered to plaintiff — Whether directors should be made liable under common law and under s 304 of the Companies Act 1965 for fraud committed by first defendant — Whether business of first defendant was carried out 'with intent to defraud creditors or for any fraudulent purpose' — Whether directors were 'knowingly a party to the carrying on of the business in that manner' within the meaning of s 304(1) of the CA — Companies Act 1965 s 304

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Contract — Fraud — Proof of — First defendant issued invoice to plaintiff despite knowing no services rendered to plaintiff — Plaintiff filed action against defendants premised on fraud, breach of fiduciary duty, unjust enrichment, restitution and knowing receipt — Defendants brought third party action claiming for indemnity — Whether elements of fraud were proven on balance of probabilities — Whether plaintiff had proven its claim against first defendant based on fraud, breach of fiduciary duty, unjust enrichment, restitution and knowing receipt — Whether defendants were entitled to seek indemnity from third parties

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The plaintiff was a company involved in the business of manufacturing air conditioners whereas the first defendant carried on business as a freight forwarder. In the present case, the first defendant was engaged by the plaintiff as forwarding agent. The second to eight defendants were the directors of the first defendant. The first third party ('Dato Shan') was the plaintiff's general manager at the material time whereas Dato Shan's sister ('the second third party') and the third third party, were directors and shareholders in the fourth third party, Mutiara Maju Gemilang Sdn Bhd ('MMG'). The plaintiff filed the present action to recover the monies paid under the false invoices ('the subject invoices') that were issued by the first defendant and its directors to the plaintiff. The plaintiff submitted that the first defendant had committed fraud by issuing the subject invoices despite knowing that no services as stated therein had been rendered to them. The plaintiff also founded its claim on breach of fiduciary duty, unjust enrichment, restitution and knowing receipt. The

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plaintiff further argued that the directors of the first defendant were also personally liable for the fraud committed by the first defendant under common law by lifting the corporate veil and under s 304 of the Companies Act 1965 ('the CA'). In defence, the first defendant and the eighth defendant ('Gana') acknowledged that the subject invoices were false, but argued that the issuance of the subject invoices were made under the instructions of Dato' Shan who falsely represented that the plaintiff needed the invoices for the tax management scheme of its excess funds ie by channeling the monies paid to the first defendant under the subject invoices to the plaintiff's associated company, MMG. The directors of the first defendant denied liability and argued that Gana was solely responsible for the management and operation of the first defendant at the material time and that they were not aware of the subject invoices. Alternatively, the defendants submitted that they were entitled to seek indemnity against the third parties in the event that they should be held to be liable to return the monies to the plaintiff. The third parties denied the first defendant's allegation and pleaded that the monies the first defendant remitted to MMG was a donation for the construction of a temple in Shah Alam. The third parties contended that in view of the defendants admission of fraud, the court should dismiss the third party action as it amounted to an abuse of the process of court. It was argued that the court should not assist the defendants based on the maxim *ex turpi causa non oritur action* ('the third parties' argument'). The issues to be tried were: (a) whether the plaintiff had proven its claim against the first defendant on fraud; (b) if yes, whether the directors should also be made liable for the fraud committed by the first defendant; (c) whether the plaintiff had proven its claim against the first defendant in respect of the other causes of action; and (d) whether the defendants were entitled to seek indemnity from the third parties.

Held, allowing the plaintiff's claim against the defendants with costs of RM30,000 and allowing the defendants' claim for indemnity from the third parties with costs of RM10,000:

(1) Based on the evidence, the court found that the first defendant had issued the subject invoices to the plaintiff and transferred the monies to MMG on Dato Shan's instructions. However, the court also found that the intention of the first defendant in doing so was not to help the plaintiff but to ensure that Dato' Shan would not carry out his threat to terminate the first defendant's contract with the plaintiff. As such, the contention of the first defendant that no fraud had been committed by the first defendant as the subject invoices were issued on the instructions of Dato Shan to assist the plaintiff was without merit (see paras 30 & 34).

(2) By the first defendant's own admission, it had invoiced the plaintiff and received payment from the latter for services that were not rendered. It could not be gainsaid that by issuing the subject invoices, the first defendant had made a false representation to the plaintiff that services

had been provided with the intention that the plaintiff would act on them; and the plaintiff acted on the invoices by making the necessary payments to the first defendant. Based on the above findings, the elements of fraud had been proven on a balance of probabilities. In relation to the measure of damages, the plaintiff had paid the first defendant the sum of RM8,052,155.21 in reliance on the subject invoices. The plaintiff thus had suffered losses in the sum RM8,052,155.21 as a result of the first defendant's fraud. The court therefore found this was the measure of the plaintiff's loss for which the first defendant must compensate it (see paras 35–37).

(3) It was common ground that the first defendant was the plaintiff's forwarding agent, it could not be gainsaid that the first defendant had acted in breach of its fiduciary duty as agent of the plaintiff by receiving payments under the subject invoices despite knowing no services had been rendered. Further, by knowingly receiving the monies made from breach of fiduciary duty, the first defendant became a constructive trustee over the same and was liable to account to the plaintiff. Equally, on the facts, it was undisputable that the first defendant had unjustly enriched itself at the plaintiff's expense by receiving the monies when no services had been rendered. On totality, the plaintiff's claim against the first defendant in respect of all the causes of action pleaded in its pleading, to wit, breach of fiduciary duty, knowing receipt and unjust enrichment had been established (see paras 39–42).

(4) Following from the decisions of the Federal Court on the subject of doctrine of corporate personality, this court accepted the submission advanced by the plaintiff that when fraud was committed, those who had abuse of the principle of corporate liability could be made personally liable. Based on the above finding, the court found that the plaintiff was entitled to pierce the corporate veil of the first defendant to hold the directors liable (see paras 55–56).

(5) To successfully rely on s 304(1) of the CA, the plaintiff must prove the following elements: (a) that the business of the first defendant was carried out 'with intent to defraud creditors or for any fraudulent purpose'; and (b) that the directors were knowingly a party to the carrying on of the business in that manner' within the meaning of s 304(1) of the CA. In view of the court's finding that the first defendant had issued the subject invoices to defraud the plaintiff (a creditor of the first defendant), element (a) had been proven (see paras 60–61).

(6) In relation to element (b), Gana admitted and acknowledged that he was responsible for the issuance of the subject invoices to the plaintiff, but the other directors chose not to give evidence. By electing not to give evidence, it would follow that an adverse inference ought to be drawn against them. It was inherently improbable that the entire business of the

first defendant was carried on by Gana, a 18 year old boy in 2009 as alleged by the other directors. By reason of the directors' reckless indifference, the court was entitled to infer that the directors were knowingly parties to the fraudulent transaction of the first defendant company. In the circumstances, the plaintiff was also entitled to rely on s 304 of the CA to seek the corporate veil of the first defendant be lifted to make Gana and the other directors personally liable on the plaintiff's claim in this action (see paras 62–63 & 66).

(7) It was clear on the evidence that the defendants did not retain any of the monies received under the subject invoices but had remitted the same to MMG. To yield to the third parties' argument would result in the third parties getting away scot free and unjustly enriched. The court accepted that the defendants conduct in issuing the false invoices was serious but what was most glaring was that Dato' Shan was as culpable as the defendants and so to deny the third party claim would give him and his sister a substantial windfall. On the evidence, it was clear that Dato' Shan perpetrated a fraud on the plaintiff by using the defendants to siphon out monies. He and his sister had incorporated MMG in an attempt to avoid recognition and used it as a tool or facade to cover up their wrongdoings. In the result, the court was of the view that it was in the public interest to allow the defendants' claim against Dato' Shan and his sister. Dato' Shan was the mastermind behind the scheme to defraud the plaintiff and had used the defendants to achieve his purpose (see paras 71–72).

[Bahasa Malaysia summary

Plaintif adalah sebuah syarikat yang terlibat dalam perniagaan pembuatan penghawa dingin manakala defendan pertama menjalankan perniagaan sebagai penghantar barang. Dalam kes ini, defendan pertama dilantik oleh plaintif sebagai ejen penghantar barang. Defendan kedua hingga defendan ke lapan adalah pengarah-pengarah defendan pertama. Pihak ketiga pertama ('Dato Shan') adalah pengurus besar plaintif pada masa itu manakala adik perempuan Dato' Shan ('pihak ketiga kedua') dan pihak ketiga ketiga, adalah pengarah dan pemegang saham dalam pihak ketiga keempat, Mutiara Maju Gemilang Sdn Bhd ('MMG'). Plaintif memfailkan tindakan semasa untuk mendapatkan kembali wang yang dibayar di bawah invois palsu ('invois subjek') yang dikeluarkan oleh defendan pertama dan pengarah-pengarahnya kepada plaintif. Plaintif berhujah bahawa defendan pertama telah melakukan penipuan dengan mengeluarkan invois subjek tersebut walaupun mengetahui bahawa tidak terdapat perkhidmatan yang diberikan kepada plaintif seperti yang dinyatakan di dalam invois tersebut. Plaintif juga memfailkan tuntutannya atas dasar pelanggaran kewajipan fidusiari, pengkayaan tidak adil, restitusi dan mengetahui penerimaan. Plaintif selanjutnya berpendapat bahawa pengarah-pengarah defendan pertama juga secara peribadi bertanggungjawab atas penipuan yang dilakukan oleh defendan pertama di

bawah 'common law' dengan mengangkat tirai korporat dan di bawah s 304 Akta Syarikat 1965 ('Akta tersebut'). Dalam pembelaan, defendan pertama dan defendan kelapan ('Gana') mengakui bahawa invois subjek tersebut adalah palsu, tetapi mereka menyatakan bahawa pengeluaran invois subjek tersebut dibuat di bawah arahan Dato' Shan yang secara tidak jujur menyatakan kepada mereka bahawa plaintif memerlukan invois tersebut untuk skim pengurusan cukai lebihan dana, iaitu dengan menyalurkan wang yang dibayar kepada defendan pertama di bawah invois tersebut kepada syarikat yang bersangkutan dengan plaintif iaitu MMG. Pengarah-pengarah defendan pertama menafikan tanggungjawab dan berpendapat bahawa Gana bertanggungjawab sepenuhnya untuk pengurusan dan operasi defendan pertama pada waktu yang material dan bahawa mereka tidak mengetahui mengenai invois subjek tersebut. Sebagai alternatif, defendan-defendan berhujah bahawa mereka berhak untuk menuntut tanggung rugi terhadap pihak ketiga sekiranya mereka dianggap bertanggungjawab untuk mengembalikan wang kepada plaintif. Pihak ketiga membantah tuduhan defendan pertama dan menyatakan bahawa wang yang disalurkan oleh defendan pertama kepada MMG adalah sumbangan untuk pembinaan kuil di Shah Alam. Pihak ketiga berhujah bahawa memandangkan defendan-defendan telah mengakui melakukan penipuan, mahkamah harus menolak tindakan pihak ketiga kerana ia adalah penyalahgunaan proses mahkamah. Mereka berpendapat bahawa mahkamah tidak boleh membantu defendan-defendan berdasarkan maksim *ex turpi causa non oritur action* ('hujah pihak ketiga'). Isu-isu yang perlu diputuskan adalah: (a) sama ada plaintif telah membuktikan tuntutannya atas kausa penipuan terhadap defendan pertama; (b) jika ya, sama ada pengarah-pengarah juga harus bertanggungjawab atas penipuan yang dilakukan oleh defendan pertama; (c) sama ada plaintif telah membuktikan tuntutannya terhadap defendan pertama di atas kausa-kausa tindakan yang lain; dan (d) sama ada defendan berhak menuntut tanggung rugi daripada pihak ketiga.

Diputuskan, membenarkan tuntutan plaintif terhadap defendan-defendan dengan kos RM30,000 dan membenarkan tuntutan tanggung rugi defendan-defendan daripada pihak-pihak ketiga dengan kos RM10,000:

(1) Berdasarkan keterangan, mahkamah mendapati bahawa defendan pertama telah mengeluarkan invois subjek tersebut kepada plaintif dan memindahkan wang tersebut ke MMG atas arahan Dato' Shan. Namun, mahkamah juga mendapati bahawa niat defendan pertama melakukannya bukan untuk menolong plaintif tetapi untuk memastikan bahawa Dato' Shan tidak akan melaksanakan ancamannya untuk menamatkan kontrak defendan pertama dengan plaintif. Oleh yang demikian, hujahan defendan pertama bahawa tidak ada penipuan yang dilakukan oleh defendan pertama kerana invois subjek tersebut dikeluarkan atas arahan Dato' Shan untuk membantu plaintif adalah tidak bermerit (lihat perenggan 30 & 34).

(2) Melalui pengakuan defendan pertama sendiri, pihaknya telah memberikan invois kepada plaintif dan menerima pembayaran daripada plaintif untuk perkhidmatan yang tidak diberikan. Tidak dapat dipertikaikan bahawa dengan mengeluarkan invois subjek tersebut, defendan pertama telah membuat pernyataan palsu kepada plaintif bahawa perkhidmatan telah diberikan dengan tujuan bahawa plaintif akan bertindak terhadap invois tersebut; dan plaintif bertindak terhadap invois tersebut dengan membuat pembayaran yang diperlukan kepada defendan pertama. Berdasarkan dapatan-dapatan di atas, elemen-elemen penipuan telah dibuktikan di atas imbangan kebarangkalian. Berkaitan dengan ukuran ganti rugi, plaintif telah membayar kepada defendan pertama sejumlah RM8,052,155,21 dengan bergantung kepada invois subjek tersebut. Oleh itu, plaintif telah mengalami kerugian sebanyak RM8,052,155,21 akibat penipuan defendan pertama. Oleh yang demikian, mahkamah mendapati bahawa ini adalah ukuran kerugian plaintif yang mana defendan pertama harus membayarnya (lihat perenggan 35–37).

(3) Pihak-pihak bersetuju bahawa defendan pertama adalah ejen penghantar plaintif, tidak dapat dipertikaikan bahawa defendan pertama telah bertindak melanggar kewajipan fidusiari sebagai ejen plaintif dengan menerima pembayaran di bawah invois tersebut walaupun mengetahui bahawa tiada perkhidmatan telah diberikan. Selanjutnya, apabila defendan pertama dengan sengaja menerima wang hasil daripada pelanggaran kewajipan fidusiari, defendan pertama menjadi pemegang amanah konstruktif ke atas wang tersebut dan bertanggung jawab untuk membayar kepada pihak plaintif. Begitu juga, berdasarkan fakta, tidak dapat dipertikaikan bahawa defendan pertama telah memperkaya dirinya secara tidak adil di atas perbelanjaan plaintif dengan menerima wang tersebut sedangkan tidak ada perkhidmatan yang diberikan. Secara keseluruhannya, tuntutan plaintif terhadap defendan pertama berkenaan dengan semua kausa tindakan yang diplidkan dalam pliding iaitu pelanggaran kewajiban fidusiari, mengetahui penerimaan dan pengkayaan yang tidak adil telah dibuktikan (lihat perenggan 39–42).

(4) Berikutan keputusan Mahkamah Persekutuan mengenai doktrin keperibadian korporat, mahkamah ini menerima hujahan yang dikemukakan oleh plaintif bahawa apabila penipuan dilakukan, mereka yang telah menyalahgunakan prinsip tanggungjawab korporat boleh dipertanggungjawabkan secara peribadi. Berdasarkan dapatan di atas, mahkamah mendapati bahawa plaintif berhak untuk menembusi tirai korporat defendan pertama bagi mempertanggungjawabkan pengarah-pengarah defendan pertama (lihat perenggan 55–56).

(5) Untuk berjaya bergantung kepada s 304(1) Akta tersebut, plaintif mesti membuktikan unsur-unsur berikut: (a) bahawa perniagaan defendan

pertama dijalankan 'dengan niat untuk menipu pemiutang atau untuk tujuan penipuan'; dan (b) bahawa pengarah-pengarah 'secara sedar adalah pihak yang menjalankan perniagaan dengan cara yang tersebut' dalam maksud s 304(1) Akta tersebut. Mengingat keputusan mahkamah bahawa defendan pertama telah mengeluarkan invois subjek tersebut untuk menipu plaintif (pemiutang defendan pertama), elemen (a) telah terbukti (lihat perenggan 60–61).

(6) Berkaitan dengan elemen (b), Gana mengakui dan mengesahkan bahawa dia bertanggungjawab atas pengeluaran invois subjek tersebut kepada plaintif, tetapi pengarah-pengarah lain memilih untuk tidak memberikan keterangan. Dengan memilih untuk tidak memberikan keterangan, maka akan timbul anggapan buruk terhadap mereka. Sememangnya mustahil bahawa seluruh urusan defendan pertama dijalankan oleh Gana, seorang budak lelaki berusia 18 tahun pada tahun 2009 seperti yang didakwa oleh pengarah-pengarah lain. Oleh kerana sikap acuh tak acuh pengarah-pengarah tersebut, mahkamah berhak membuat anggapan bahawa pengarah-pengarah tersebut adalah pihak yang mengetahui adanya transaksi penipuan syarikat defendan pertama. Dalam keadaan tersebut, plaintif juga berhak untuk bergantung pada s 304 Akta tersebut untuk memohon agar tirai korporat defendan pertama diangkat untuk memastikan Gana dan pengarah-pengarah lain secara peribadi bertanggungjawab atas tuntutan plaintif dalam tindakan ini (lihat perenggan 62–63 & 66).

(7) Sudah jelas pada keterangan bahawa defendan-defendan tidak menyimpan wang yang diterima di bawah invois subjek tersebut tetapi telah menyerahkannya kepada MMG. Untuk menerima hujah pihak ketiga akan mengakibatkan pihak ketiga melepaskan diri bebas dari tindakan dan diperkaya secara tidak adil. Mahkamah bersetuju bahawa tingkah laku defendan-defendan dalam mengeluarkan invois palsu adalah serius tetapi apa yang lebih jelas adalah bahawa Dato' Shan juga sama bersalah seperti defendan-defendan dan dengan menafikan tuntutan pihak ketiga akan memberikan dia dan adiknya keuntungan yang besar. Berdasarkan keterangan, jelas bahawa Dato' Shan melakukan penipuan ke atas plaintif dengan menggunakan defendan-defendan untuk menggelapkan wang. Dia dan adiknya telah menubuhkan MMG dalam usaha untuk mengelak daripada dikenali dan menggunakannya sebagai alat atau fasad untuk menutup kesalahan mereka. Hasilnya, mahkamah berpendapat bahawa adalah demi kepentingan umum untuk membenarkan tuntutan defendan-defendan terhadap Dato' Shan dan adiknya. Dato' Shan adalah dalang di sebalik rancangan untuk menipu plaintif dan telah menggunakan defendan-defendan untuk mencapai tujuannya (lihat perenggan 71–72).]

Cases referred to

Ahmad Zahri bin Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd [2020] 5 MLJ 58, FC (refd)
Chin Chee Keong v Toling Corp (M) Sdn Bhd [2016] 3 MLJ 479; [2016] 6 CLJ 666, CA (refd)
Datuk Ong Kee Hui v Sinyium Anak Mutit [1983] 1 MLJ 36, FC (refd)
Doyle v Olby (Ironmongers) Ltd and others [1969] 2 All ER 119, CA (refd)
Gilford Motor Co, Ltd v Horne and another [1933] All ER Rep 109, CA (refd)
Jones and Another v Lipman and Another [1962] 1 All ER 442 (refd)
Lam Kam Loy and Anor v Boltex Sdn Bhd and Others [2005] MLJU 225; [2005] 3 CLJ 355, CA (refd)
Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd [2009] 6 MLJ 1, CA (refd)
Md Hilmi bin Md Noor & Anor (suing in their personal capacities and as administrators for the deceased, Md Noor bin Mohamed) v Azman bin Ahmad & Ors [2016] 6 MLJ 205, CA (refd)
Merita Merchant Bank Singapore Ltd v Benatulin Timur Sdn Bhd [2004] 3 CLJ 44, HC (refd)
Muhammad Kin Eezaz Abdullah v PP [2014] MLJU 1931; [2014] 6 CLJ 175 (CA) (refd)
Pang Mun Chung & Anor v Cheong Huey Charn [2018] MLJU 459, CA (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)
Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) [2014] 3 MLJ 785; [2014] 3 CLJ 73, FC (refd)
Takako Sakao v Ng Pek Yuen & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)
Tenaga Nasional Bhd v Irham Niaga Sdn Bhd [2015] MLJU 2165, CA (refd)
VTB Capital Plc v Nutritek International Corp and others [2013] UKSC 5, SC (refd)
Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors [2015] 6 MLJ 810, CA (refd)
Yui Chin Song & Ors v Lee Ming Chai & Ors [2019] 6 MLJ 417, FC (refd)
Zaharen bin Hj Zakaria v Redmax Sdn Bhd and other appeals [2016] 5 MLJ 91, CA (refd)

Legislation referred to

Companies Act 1965 s 304, 304(1)

Ramesh Abraham (Alysha Onn with him) (Shook Lin & Bok) for the plaintiff.
Wong Rhen Yen (Goik Ken Wayne and Emily Wong with him) (Dennis Nik & Weng) for the defendants.
Hasshari (Rosli with him) (Hasshahari & Partners) for the third parties.

SM Komathy J:

INTRODUCTION

[1] On 18 October 2019, the Court of Appeal ordered this case to be retried due to the unavailability of the grounds of judgment of the previous High Court judge who had retired.

[2] The action arises from false invoices that were issued by Top Square Sdn Bhd ('the first defendant') to Panasonic Appliances Air-Conditioning Malaysia Sdn Bhd ('the plaintiff'). When the falsification of the invoices came to the knowledge of the plaintiff, it instituted this action to recover the monies paid under the false invoices from the first defendant and its directors, the second to the eighth defendants. The defendants then applied to join the general manager of the plaintiff and three others as third parties to the suit.

THE PARTIES

[3] The plaintiff is a company involved in the business of manufacturing air conditioners for export.

[4] The first defendant carries on business as a freight forwarder. The second to eight defendants were the directors of the first defendant. The eighth defendant ('Gana') is the son of the second and third defendants.

[5] The first third party ('Dato Shan') was the plaintiff's general manager/assistant head of Material Management Department at the material time. The second third party, Sivapakkiam a/p Ramasamy is the sister of Dato Shan. She and the third third party, Muralitharan Thangavelu ('DW3'), were directors and shareholders in the fourth third party, Mutiara Maju Gemilang Sdn Bhd ('MMG').

[6] The claim against the fourth defendant was discontinued when he passed away soon after the commencement of this action. The third party proceedings against DW3 and MMG were also discontinued sometime thereafter when the defendants found out that DW3 was a bankrupt, and MMG had been deregistered.

BACKGROUND FACTS

[7] The first defendant was engaged by the plaintiff as forwarding agent. Sometime between 4 February 2009 and 18 August 2014, the first defendant issued 1,501 invoices to the plaintiff for purported freight forwarding and transportation services. The plaintiff made payment on 1,181 of these invoices

('the subject invoices'). The sum received by the first defendant in relation to the subject invoices was RM8,052,155.21. No payment was received by the first defendant in relation to the remaining 320 invoices. A

[8] Sometime in 2014, Dato Shan left the plaintiff's employment. The plaintiff then discovered discrepancies in the invoices issued by the first defendant, and appointed Price Waterhouse Coppers ('PwC') to prepare an investigation report. By letter dated 18 August 2014, the plaintiff terminated the first defendant's appointment as its freight forwarder on the ground that the latter had defrauded it by submitting false claims and false documents. The first defendant, however, did not respond to the letter. B C

[9] In March 2016, the plaintiff instituted this action against the defendants to recover the monies paid on the subject invoices, and the latter commenced third party proceedings to seek indemnity in the event they are found liable to the plaintiff. The action was subsequently set down for trial and witnesses were called. D

[10] After hearing submissions, on 17 May 2017, the previous High Court judge had allowed the plaintiff's claim and dismissed the defendants third party claim. The defendants appealed and a retrial of the action was ordered by the Court of Appeal. The case was subsequently called up before me for case management. E

[11] Counsel for both the plaintiff and third parties orally applied for the evidence recorded by the previous judge to be adopted and that I arrive at a decision on the said evidence in view of the fact the defendants had admitted in their defence that the subject invoices were false in that no services had been rendered to the plaintiff. The defendants did not support the application on the ground that they should be permitted to cross examine the witnesses who had given evidence only because they have appointed new solicitors. F G

[12] In *Muhammad Kin Eezaz Abdullah v Public Prosecutor* [2014] MLJU 1931; [2014] 6 CLJ 175 (CA) and *Merita Merchant Bank Singapore Ltd v Benatulin Timur Sdn Bhd* [2004] 3 CLJ 44 (HC), it was held that an order for retrial is not equivalent to a denovo trial and that it is up to judge who takes over to decide whether to hear denovo, or to continue and complete the original trial. In view of the admission by the defendants in their defence that the subject invoices were false, and the reason for requesting a denovo trial was only to allow their new solicitors a second bite of the cherry to cross examine the witnesses, I decided to adopt the evidence recorded by the previous judge. H I

[13] It bears mention that by the time this case was assigned to me, the first defendant had been wound up and the second and third defendants had been adjudicated bankrupts. They were therefore represented by the official receiver and official assignee, respectively.

CASE FOR THE PLAINTIFF

[14] It was the case for the plaintiff that the first defendant had committed fraud by issuing the subject invoices despite knowing that no services as stated therein had been rendered to them. By reason of this fraud, it is pleaded that the plaintiff is entitled to recover the monies paid to the first defendant under the subject invoices. The plaintiff also founded its claim to recover the monies on the basis of breach of fiduciary duty, unjust enrichment, restitution and knowing receipt.

[15] It was also the plaintiff's case that the directors of the first defendant were also personally liable for the fraud committed by the first defendant — under common law by lifting the corporate veil and under s 304 of the Companies Act 1965.

CASE FOR THE DEFENDANTS

[16] In its defence, the first defendant acknowledged that the subject invoices were false, but pleaded that they were all issued to the plaintiff on Dato Shan's instructions. The first defendant pleaded that it was not liable as it had acted on Dato Shan's instructions and had no intention to defraud the plaintiff. It was further pleaded that Dato Shan had falsely represented that the plaintiff needed the invoices for the tax management scheme of its excess funds. Dato Shan had explained that this scheme was to be executed by channeling the monies paid to the first defendant under the subject invoices to the plaintiff's associated company, MMG.

[17] It was the defence of the directors of the first defendant that they were not liable as it was Gana ([4], supra) who was solely responsible for the management and operation of the first defendant at the material time. They were not aware of the subject invoices. In the alternative, the defendants pleaded that they are entitled to seek indemnity against the third parties in the event that they should be held to be liable to return the monies to the plaintiff.

CASE FOR THE THIRD PARTIES

[18] It was Dato Shan's case that he had nothing to do with the subject invoices issued by the plaintiff to the defendants. He further denied making the representations attributed to him by the defendants. Dato Shan and his sister

pleaded that the monies the first defendant remitted to MMG was a donation for the construction of a temple in Shah Alam.

ISSUES TO BE TRIED

[19] The principal issues to be tried are:

(a) whether the plaintiff has proven its claim against the first defendant on fraud;

(b) if yes, whether the directors should also be made liable for the fraud committed by the first defendant;

(c) whether the plaintiff has proven its claim against the first defendant in respect of the other causes of action; and

(d) whether the defendants are entitled to seek indemnity from the third parties.

WITNESSES

[20] The plaintiff called two witnesses. They were Alexander Michael ('PW1'), a senior executive director of the forensics practice of PwC Consulting Services (M) Sdn Bhd, and Muralitharan Mahadavan ('PW2') a director in the plaintiff.

[21] Gana ('DW1') was the sole witness who gave evidence in support of the case for the first defendant company and its directors, whilst Dato Shan and DW3 gave evidence in support of the third parties case.

EVIDENCE

[22] There were two main factual issues here. The first has to do with the intention of the first defendant in issuing the false subject invoices to the plaintiff; and secondly, the reason for the first defendant transferring the monies it received under the subject invoices to MMG.

[23] I start with Gana's version of the facts on these two issues. He testified that he had been in control of the first defendant since 2008, when he was only 17. He became a director only in July 2014. Sometime in 2009, Dato Shan informed him that the plaintiff needed the first defendant's help to deal with tax management scheme of its excess funds by issuing fictitious invoices and remitting the payments received under the fictitious invoices to the plaintiff's associate company, MMG. According to Gana, the defendants believed him and agreed to help the plaintiff. In the belief that they were helping the plaintiff, the subject invoices were issued, and all monies received under the

A subject invoices were therefore remitted to MMG. Gana denied that the monies were remitted to MMG as a donation for a temple as alleged by the third parties.

B **[24]** I deal next with the evidence given by Dato Shan and DW3. Both acknowledged and admitted that MMG had received RM8,052,155.21 from the first defendant and that these monies had originated from the payments received by the first defendant under the subject invoices. They further admitted MMG had been created specifically to receive monies from the first defendant and that all monies received by MMG were from the first defendant. C Dato Shan also acknowledged that he was the sole signatory of MMG's bank account though he was not a director there.

D **[25]** Dato Shan, continuing with his evidence, denied that he had requested the defendants to issue false invoices to the plaintiff, and was not aware of the subject invoices. He maintained that the monies the first defendant transferred to MMG was a donation for the construction of a temple and had nothing to do with the subject invoices.

E **[26]** I shall now set out my assessment of the testimonies given by Gana and Dato Shan. Having considered their testimonies, I prefer and accept Gana's testimony that it was at the behest of Dato Shan that the subject invoices were issued. It is a more plausible account than that of Dato Shan. Dato Shan's claim that he had nothing to do with the subject invoices is simply implausible in F light of the fact that all the monies received by the first defendant under the subject invoices went to MMG and Dato Shan was the sole cheque signatory of MMG's account. If the defendants had indeed wanted to make a donation, they could have easily sent the monies to the temple instead of in a circuitous fashion through MMG. And, RM8,052,155.21 is a rather generous sum and G an odd figure to donate to a temple. It defies belief.

[27] However, I reject Gana's evidence that the first defendant had issued the subject invoices with the intention of assisting the plaintiff deal with its excess funds. Gana's evidence on this aspect is unconving for the following reasons. H First, it is to be observed that Gana had lodged a police report on 21 April 2015, wherein he had stated;

> I am also affirming here that all additional claims that I instructed Top Square Sdn Bhd to make are under the instruction of Dato' Shanmugam Ramasamy. I was given an *ultimatum either to follow his instruction or risk my contract with Panasonic* I *Malaysia Sdn Bhd being terminated*. (Emphasis added.)

[28] It is pertinent to note that there is no mention in the police report that the invoices were issued to help the plaintiff deal with its excess funds. On the contrary, the report states that the invoices were issued as Dato Shan had

threatened to terminate the defendants contract with the plaintiff if they declined to help him siphon funds out of the plaintiff. Secondly, and importantly, the plaintiff had issued a letter of termination to the first defendant on 18 August 2014. The said letter categorically stated that the basis for the termination was that the first defendant had submitted false claims and false documents. It is odd that the first defendant did not issue any response to the said letter nor dispute the allegations of false invoices. I would have thought that it would not only have been the reasonable but an obvious and immediate reaction if in fact it had acted to help the plaintiff at the latter's behest, as it now seeks to contend.

[29] Thirdly, if indeed Dato Shan had represented that the plaintiff needed the defendants help to issue false invoices to deal with its excess funds, any reasonable person would have taken the common sense step of verifying whether there was indeed a reallocation exercise by the plaintiff to divert excess funds for tax management purposes and also if MMG was in fact a company connected with the plaintiff. However, there is no explanation from the first defendant as to why this was not done.

[30] In the premises, I find that the first defendant had issued the subject invoices to the plaintiff and transferred the monies to MMG on Dato Shan's instructions. I further find that the intention of the first defendant in doing so was not to help the plaintiff but to ensure that Dato Shan would not carry out his threat to terminate its contract with the plaintiff.

[31] I turn now to address the other issues raised in this case.

WHETHER THE FIRST DEFENDANT HAD COMMITTED FRAUD ON THE PLAINTIFF

[32] Following the Court of Appeal's decision in *Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors* [2015] 6 MLJ 810, in order to succeed on a claim predicated on fraud, the plaintiff must prove:

(a) a representation of fact made by words or conduct;

(b) such representation must have been made with the knowledge that it was false, or without any genuine belief that it was true;

(c) the representation must have been made with the intention that it should be acted upon by the plaintiff;

(d) the plaintiff had acted upon the false representation; and

(e) the plaintiff suffered damage by acting upon the false representation.

[33] The issue of standard of proof in finding fraud in civil cases found a

resting place in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584, where the Federal Court held:

> *With respect, we are inclined to agree with learned counsel for the plaintiff that the correct principle to apply is as explained in In re B (Children). It is this: that at law there are only two standards of proof, namely, beyond reasonable doubt for criminal cases while it is on the balance of probabilities for civil cases. As such even if fraud is the subject in a civil claim the standard of proof is on the balance of probabilities. There is no third standard. And '(N)either the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts.*
>
> *Hence, it is therefore up to the presiding judge, after hearing and considering the evidence adduced as being done in any other civil claim to find whether the standard of proof has been attained. 'The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies'. The criminal aspect of the allegation of fraud and the standard of proof required thereof should be irrelevant in the deliberation.*

See also *Md Hilmi bin Md Noor & Anor (suing in their personal capacities and as administrators for the deceased, Md Noor bin Mohamed) v Azman bin Ahmad & Ors* [2016] 6 MLJ 205 (CA).

[34] Coming back to the instant case. Counsel for the first defendant contended that no fraud had been committed by first defendant as the subject invoices were issued on the instructions of Dato Shan to assist the plaintiff. There was absent any intention to deceive or cause harm to the plaintiff. As I have found in [30] above, the first defendant had issued the subject invoices not to help the plaintiff but to ensure that Dato Shan would not prevail on the plaintiff to terminate its appointment. The contention is thus without merit and I reject it.

[35] The basic and simple facts are these. By the first defendant's own admission, it had invoiced the plaintiff and received payment from the latter for services that were not rendered. It cannot be gainsaid that by issuing the subject invoices, the first defendant had made a false representation to the plaintiff that services had been provided with the intention that the plaintiff would act on them; and, the plaintiff acted on the invoices by making the necessary payments to the first defendant. I am therefore satisfied and find that the elements of fraud as outlined (at [32]) have been proven on a balance of probabilities.

[36] The principles governing the measure of damages for fraud were enunciated by Lord Denning in *Doyle v Olby (Ironmongers) Ltd and others* [1969] 2 All ER 119:

> In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it. In contract, the

> damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damage directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say: 'I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages'. All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen. For instance, in this very case the plaintiff has not only lost the money which he paid for the business, which he would never have done if there had been no fraud: he put all that money in and lost it; but also he has been put to expense and loss in trying to run a business which has turned out to be a disaster for him. He is entitled to damages for all his loss, subject, of course, to giving credit for any benefit that he has received. There is nothing to be taken off in mitigation: for there is nothing more that he could have done to reduce his loss. He did all that he could reasonably be expected to do.

[37] The plaintiff has paid the first defendant the sum of RM8,052,155.21 in reliance on the subject invoices. The plaintiff thus has suffered losses in the sum RM8,052,155.21 as a result of the first defendant's fraud. I therefore find this is the measure of the plaintiff's loss for which the first defendant must compensate it.

OTHER CAUSES OF ACTION

[38] As noted earlier at [14], the plaintiff's claim is also based on other causes of action.

Breach of fiduciary duty

[39] It being common ground that the first defendant was the plaintiff's forwarding agent, it could not be gainsaid that the first defendant had acted in breach of its fiduciary duty as agent of the plaintiff by receiving payments under the subject invoices despite knowing no services had been rendered. The first defendant is therefore liable to account to the plaintiff for the gains made out of breach of fiduciary duty.

Knowing receipt

[40] I also find that by knowingly receiving the monies made from breach of fiduciary duty, the first defendant becomes a constructive trustee over the same and is liable to account to the plaintiff.

Unjust enrichment and restitution

[41] Equally, on the facts, it is undisputable that the first defendant had unjustly enriched itself at the plaintiff's expense by receiving the monies when no services had been rendered.

[42] I therefore find that the plaintiff's claim against the first defendant in respect of all the causes of action pleaded in its pleading, to wit, breach of fiduciary duty, knowing receipt and unjust enrichment have been established.

WHETHER DIRECTORS OF D1 ARE LIABLE FOR THE FRAUD COMMITTED BY D1

[43] That brings me to the second issue. It is trite that a company is nothing but an association of persons, who are its beneficiaries, governed by the directors and shareholders of the company. Thus, oftentimes situations arise, when these beneficiaries try to misuse this veil and in such situations the corporate veil of separate legal entity of the company has to be removed and the members of the company are made liable directly.

[44] It is settled law that the company alone is liable for all the acts done and the debts incurred by it and not the directors or the shareholders who are in fact the beneficial owners of the company. But a company is not capable of doing any act itself, and the business is always carried on by individuals. Piercing the corporate veil is one of the most widely used concepts to attribute liability to that person who has misused or abused the principle of corporate personality. See *Ahmad Zahri bin Mirza Abdul Hamid v AIMS Cyberjaya Sdn Bhd* [2020] 5 MLJ 58 (FC).

[45] The plaintiff seeks to make the directors liable by lifting the corporate veil to hold them accountable for the fraudulent acts of the first defendant. They rely on two grounds: (a) common law; and (b) s 304(1) of the Act of the Companies Act 1965.

Common Law

[46] I take ground (a) first. The two oft quoted cases on the subject are *Gilford Motor Co, Ltd v Horne and another* [1933] All ER Rep 109 and *Jones and Another v Lipman and Another* [1962] 1 All ER 442

[47] In the *Gilford Motor* case, Mr Horne was an ex-employee of the Gilford Motor Company and his employment contract provided that he could not solicit the customers of the company. In order to defeat this, he incorporated a limited company in his wife's name and solicited the customers of the company. The company brought an action against him. The Court of Appeal was of the view that if a company is formed only for the purpose of carrying on

an activity which a person would otherwise be barred for doing or as a mere sham to cloak his wrongdoings, then the corporate veil could be lifted.

[48] In the second case of *Jones v Lipman*, the defendant contracted to sell his land to the plaintiff and thereafter changed his mind, and in order to avoid an order of specific performance, he transferred his property to a company. The plaintiff brought a suit of specific performance against the defendant. The court in this case lifted the corporate veil and ordered specific performance both against the defendant and the company. The court held that the company here was a 'mask which (Mr Lipman) held before his face in an attempt to avoid recognition by the eye of equity'.

[49] The principle enunciated in the two cases quoted in the preceding paragraphs has been applied in numerous Malaysian cases. In *Takako Sakao v Ng Pek Yuen & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381, the appellant, a Japanese citizen and the first respondent were business partners in a restaurant and decided to acquire a property in which they operated their restaurant business. The appellant contributed to the purchase price. The first respondent purchased the property and registered it in her sole name. Thereafter, the first respondent sold the property to the second respondent company. The appellant then commenced proceedings against the respondents to establish that she was the beneficial owner of the property. The Federal Court in allowing the appellant's claim explained at [23] and [27]:

> *A more recent statement of the doctrine of corporate personality is to be found in the case of Woolfson v Strathclyde Regional Council* 1978 SLT 159 *which is authority for the proposition that a litigant who seeks the court's intervention to pierce the corporate veil must establish special circumstances showing that the company in question is a mere facade concealing the true facts.*
>
> *So here. The first respondent sold and transferred trust property to the second respondent which was a device and a sham, a mask which the first respondent's husband held before his face in an attempt to avoid recognition by the eye of equity. Accordingly, this is a case in which there are special circumstances showing that the second respondent company is a mere façade concealing the true facts. The trial judge was therefore correct in holding the second respondent accountable to the appellant for the trust property …*

[50] A more recent statement of the doctrine of corporate personality is to be found in the decision of the Court of Appeal in *Tenaga Nasional Bhd v Irham Niaga Sdn Bhd* [2015] MLJU 2165. In this case, the court cited with approval the judgment of the Supreme Court of United Kingdom in *VTB Capital Plc v Nutritek International Corp and others* [2013] UKSC 5 wherein the latter went to substantially restate the English company law position in relation to piercing of the corporate veil.

[51] It would be useful to briefly deal with the facts in *VTB Capital* case.

There the plaintiff, VTB Capital, took the position that it had been induced into entering a $225m loan agreement on the basis of fraudulent misrepresentations by a Russian businessman, Mr Konstantin Malofeev, who was said to be the ultimate owner of both the borrower/purchase ('RAP LLC, a Russian company') and the vendor ('Nutritek') on an asset sale transaction. When the borrower defaulted and became insolvent, VTB sought permission to sue Mr Malofeev, Nurtritek and other alleged group companies for deceit and conspiracy. VTB also applied to pierce the corporate veil and include a claim against the defendants for damages for breach of contract, alleging that Malofeev used RAP as a puppet company to orchestrate the fraud. VTB was unsuccessful and appealed to the Supreme Court.

[52] The Supreme Court was asked to decide whether the corporate veil could be lifted in order to hold the person controlling the company liable, as if he had been a co-contracting party with the company concerned, to a contract where the company was a party but he was not, and where neither he nor any of the contracting parties intended him to be. The court concluded that it would be contrary to existing authority or principle to pierce the veil in this way and that the corporate veil can only be pierced if there is some 'impropriety' and the impropriety must be linked to the use of the company structure to avoid or conceal liability.

[53] The Court of Appeal in *Tenaga Nasional Bhd v Irham Niaga* ([50]) concluded after examining *VTB Capital* and the other cases on the subject:

> Having examined the authorities cited before us, we were of the considered view that the principles of law on the lifting of the corporate veil as set out in those authorities could be distilled into the following:
>
> (1) the corporate veil could be lifted/pierced in exceptional circumstances; and
>
> (2) those exceptional circumstances must involve:
>
> (a) actual or equitable fraud; and
>
> (b) the use of the company whose corporate veil was to be lifted as the means to conceal the true facts behind the façade of the company.

[54] Counsel for the defendants argued that it can be readily seen from the decision in *Tenaga Nasional Bhd v Irham Niaga* that if the court is to pierce the veil it is necessary to show both control of the company by the directors and impropriety, that is, misuse of the company by them as a device or façade to conceal their wrongdoing. It was submitted that it did not follow automatically from a finding that fraud has been committed that the corporate veil of the company should be pierced to make its controller liable. It was said that on the facts of the instant case it was patently clear that the first defendant's corporate structure was never used by Gana or the other directors to commit the alleged

fraud. In the absence of any abuse of the corporate form by the directors, it was argued, the court should decline to lift the corporate veil.

[55] In answer, counsel for the plaintiff argued that this court is bound by the decisions of the Federal Court wherein it has been held that when fraud is committed, those who have abuse of the principle of corporate liability can be made personally liable. He cited *Takako Sakao v Ng Pek Yuen & Anor* [49] above, *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)* [2014] 3 MLJ 785; [2014] 3 CLJ 73 (FC) and *Lam Kam Loy and Anor v Boltex Sdn Bhd and Others* [2005] MLJU 225; [2005] 3 CLJ 355 (CA).

[56] Following from the decisions of the Federal Court on the subject of doctrine of corporate personality, I accept the submission advanced by the plaintiff. In light of the foregoing, I find that the plaintiff is entitled to pierce the corporate veil of the first defendant to hold the directors liable.

Section 304 of the Companies Act

[57] In the event, I am wrong, it behoves me to next look at ground (b). The plaintiff contends that the directors should be held personally liable under s 304 of the Companies Act as they had carried on the business of the company with intention to defraud the plaintiff as the company's creditor.

[58] Section 304(1) of the Companies Act 1965 provides:

> *If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company may if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.*

[59] In *Chin Chee Keong v Toling Corp (M) Sdn Bhd* [2016] 3 MLJ 479; [2016] 6 CLJ 666, the Court of Appeal explained the scope of s 304 at [17] and [29] as follows:

> *The primary object behind s 304(1) of the Act is to statutorily provide for the lifting of the veil of incorporation in the specific circumstances of fraudulent trading with a view to ultimately pinning personal accountability and liability on the directing minds behind such trading of the company. … affords the creditor of the company a civil remedy against such persons.*
>
> *The applicable standard of proof for a statutory claim under s 304(1) is on a balance of*

probabilities. The term 'if it appears' is deployed in the provision and this clearly indicates that a lower degree of proof is required. That lower degree of proof is on a balance of probabilities.

[60] To successfully rely on s 304(1), the plaintiff must prove the following elements:

(a) that the business of the first defendant was carried out 'with intent to defraud creditors or for any fraudulent purpose'; and

(b) that the directors were knowingly a party to the carrying on of the business in that manner' within the meaning of s 304(1).

[61] In view of my finding at [34] and [35], that the first defendant had issued the subject invoices to defraud the plaintiff (a creditor of the first defendant), element (a) has been proven.

[62] As for the second element, Gana admitted and acknowledged that he was responsible for the issuance of the subject invoices to the plaintiff. As for the other directors, it was their pleaded defence that they were not privy to the fraud committed by the first defendant and Gana. It is trite that the legal burden of proving an allegation lies on the party asserting the allegation. In other words, where a given allegation forms an essential part of a party's case or defence, the proof of the allegation rests on him. The burden was therefore on the directors to show that they played no role in the management and operation of the first defendant and were not privy or complicit to the fraud in order to make good their defence. But, for reasons not disclosed, the other directors chose not to give evidence. By electing not to give evidence, it would follow that an adverse inference ought to be drawn against them. See *Takako Sakao v Ng Pek Yuen & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381.

[63] In my view, it is inherently improbable that the entire business of the first defendant was carried on by Gana, a 18 year old boy in 2009 as alleged by the other directors. Even if this is true, there must some explanation as to why they did not play an active part in the management and operation or perform any supervisory function in the first defendant knowing that Gana was a greenhorn. In my view, by reason of their reckless indifference, the court is entitled to infer that the directors were knowingly were parties to the fraudulent transaction of the first defendant company.

[64] A director not only owes a fiduciary duty to the company but also a duty to act in the company's best interest. The fact that a person accepts the position of a director impliedly warrants that he accepts the responsibilities together with its fiduciary and statutory duties. He must exercise fair and reasonable diligence in the management of the company's affairs, and to act honestly.

[65] In this regard, it is useful to refer to *Zaharen bin Hj Zakaria v Redmax Sdn Bhd and other appeals* [2016] 5 MLJ 91, where the Court of Appeal explained the duties of a director. It was held at para 62:

> *In other words, a director of a company has to give his all to serve in the best interest of the company of which he is a director. As a fiduciary, the company is backed up by the statutory provision to expect nothing less from its directors. Gone are the days when a company director can be heard to say that he was a sleeping director and expect to escape liability. His duty may appear onerous but that is to be expected as he is part of the alter ego of the company.*
>
> *He is a fiduciary, a trustee. It is not his business to act like a rogue, much less to act to the detriment of the company.*

[66] In the premises, I find that Gana and the other directors were knowingly parties to the first defendant operating or carrying on business with intent to defraud the plaintiff, a creditor of the first defendant. In the circumstances, the plaintiff is also entitled to rely on s 304 to seek the corporate veil of the first defendant be lifted to make Gana and the other directors personally liable on the plaintiff's claim in this action.

THIRD PARTY ACTION

[67] The defendants claim for indemnity is based on the allegation that all the transactions complained of were carried out pursuant to the oral instructions and/or 'understanding' of Dato Shan. Dato Shan had told them to act as they did and, therefore, was under an obligation to indemnify them for the consequences. The defendants also seek an order for the court to lift the corporate veil of MMG to make Dato Shan and his sister liable.

[68] It is trite that the right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relationship between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other.

[69] I have already found at [30] that the defendants had issued the subject invoices because of Dato Shan's threat to terminate the first defendant's appointment if they refused to help him perpetrate a fraud on the plaintiff. Given this finding, the question arises, should the court assist them to seek indemnity from the third parties.

[70] Counsel for the third parties contended that in view of the defendants admission of fraud, the court should dismiss the third party action as it amounts to an abuse of the process of court. It was argued that the court should

A not assist the defendants based on the maxim *ex turpi causa non oritur actio*. The following cases were cited in support of this proposition. See *Datuk Ong Kee Hui v Sinyium Anak Mutit* [1983] 1 MLJ 36; *Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 1; *Pang Mun Chung & Anor v Cheong Huey Charn* [2018] MLJU 459 and *Yui Chin Song & Ors v Lee Ming Chai & Ors* [2019] 6 MLJ 417.

B

[71] The third parties position is difficult for me to accept. It is clear on the evidence that the defendants did not retain any of the monies received under the subject invoices but had remitted the same to MMG. To yield to the C argument of counsel for the third parties would result in the third parties getting away scot free and unjustly enriched. I accept that the defendants conduct in issuing the false invoices is serious but what is most glaring is that Dato Shan is as culpable as the defendants and so to deny the third party claim would give him and his sister a substantial windfall. On the evidence, it is clear D that Dato Shan perpetrated a fraud on the plaintiff by using the defendants to siphon out monies. He and his sister had incorporated MMG in an attempt to avoid recognition and used it as a tool or facade to cover up their wrong doings.

[72] In the result, I am of the view that it is in the public interest to allow the E defendants claim against Dato Shan and his sister. Dato Shan was the mastermind behind the scheme to defraud the plaintiff and had used the defendants to achieve his purpose.

F **[73]** There is one other matter that I must consider. It was the defendants contention that the plaintiff should have instituted this action against Dato Shan instead of them. It is apposite to point out that the defendants have not pleaded in their defence that the plaintiff had been aware of the actions of Dato Shan at the material time. In the circumstance, I fail to see how this issue is G relevant to the plaintiff's claim against the defendants or how it can exculpate the defendants from their own admitted fraud in the present case.

[74] For these reasons, I allow the plaintiff's claim against the defendants with costs of RM30,000. I further allow the defendants claim for indemnity H from the third parties with costs of RM10,000.

Plaintiff's claim against the defendants allowed with costs of RM30,000; defendants' claim for indemnity from third parties allowed with costs of RM10,000.

I

Reported by Dzulqarnain bin Ab Fatar